

**In the United States District Court  
for the Northern District of California  
Magistrate Judge Elizabeth D. Laporte**

**CIVIL MINUTES**

Date: April 17, 2007

Case No: **C- 06-07026 EDL**

Case Name: **SHALABY ET AL v. NEWELL RUBBERMAID, INC. ET AL**

Attorneys: Pltf: Mark Epstein Deft: Phillip Moorehead, Beth Naylor

Deputy Clerk: Lili M. Harrell FTR digital recording: 10:28am-11:00am

**PROCEEDINGS:**

**RULING:**

- |  |      |
|--|------|
| 1. Telephonic Case Management Conference | Held |
| 2.                                       |      |

**ORDERED AFTER HEARING:**

**Order to be prepared by:** ☐ Plntf ☐ Deft ☒ Court

**Case continued to:** 8/21/2007 at 10:00 a.m. for further case management conference.

**PRETRIAL SCHEDULE:**

Last day to add new parties: 6/18/07  
Discovery cutoff: 10/24/07  
Initial expert disclosure deadline: 11/7/07  
Rebuttal expert disclosure deadline: 11/14/07  
Expert discovery cutoff: 12/14/07  
Dispositive Motion filing deadline: 12/21/07  
Dispositive Motions hearing date: 1/29/08 at 9:00am  
Pretrial Conference: 4/8/08 at 2:00pm  
Trial: 4/28/08 at 8:30 a.m., set for 7 days.  
☒ Jury ☐ Court

Notes: Matter previously referred for private mediation, to be completed by 7/25/2007.

cc:

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIAANDREW SHALABY and  
SONIA DUNN-RUIZ,

Plaintiffs,

No. C-06-07026 EDL

v.

CASE MANAGEMENT AND  
PRETRIAL ORDER FOR JURY TRIALNEWELL RUBBERMAID, INC.,  
et al.,

Defendants.

Following the Case Management Conference held on April 17, 2007, IT IS HEREBY  
ORDERED THAT:

A further case management conference is set for August 21, 2007 at 10:00 a.m. before  
Magistrate Judge Laporte in Courtroom E, 15th Floor, U.S. District Court, 450 Golden Gate Avenue,  
San Francisco, California. An updated joint case management conference statement shall be filed no  
later than August 14, 2007.

Pursuant to Fed. R. Civ. P. 16, IT IS FURTHER ORDERED THAT the following case  
management and pretrial order is entered:

1. TRIAL DATE

a. Jury trial will begin on April 28, 2008 at 8:30 a.m. in Courtroom E, 15th Floor,  
450 Golden Gate Avenue, San Francisco, CA 94102. Any party who wants to order a daily transcript  
must notify the Court Reporter Supervisor at least two weeks before the trial.

b. The length of the trial will be not more than 7 days.

2. DISCOVERY

a. All non-expert discovery shall be completed no later than October 24, 2007. There will be no further non-expert discovery after that date except by order of the Court for good cause shown. Motions to compel non-expert discovery must be filed within the time limits contained in Civil Local Rule 26-2.

b. Initial expert disclosures shall be made no later than November 7, 2007. Rebuttal expert disclosures shall be made no later than November 14, 2007. All treating physicians who will provide opinion testimony beyond that which can be provided by a lay person must be disclosed as expert witnesses, but they need not prepare expert reports unless ordered to do so by the Court.

c. All expert discovery shall be completed no later than December 14, 2007. There will be no further expert discovery after that date except by order of the Court for good cause shown. Motions to compel expert discovery must be filed within the time limits contained in Civil Local Rule 26-2.

d. Rule 26(e)(1) of the Federal Rules of Civil Procedure requires all parties to supplement or correct their initial disclosures, expert disclosures, pretrial disclosures, and responses to discovery requests under the circumstances itemized in that Rule, and when ordered by the Court. The Court expects that the parties will supplement and/or correct their disclosures promptly when required under that Rule, without the need for a request from opposing counsel. **In addition to the general requirements of Rule 26(e)(1), the parties will supplement and/or correct all previously made disclosures and discovery responses 28 days before the fact discovery cutoff date.**

e. Pursuant to Civil L.R. 37-1(b), telephone conferences are available to resolve disputes during a discovery event, such as a deposition, where the resolution during the event likely would result in substantial savings of expense or time.

f. **Privilege logs.** If a party withholds information that is responsive to a discovery request, and is otherwise discoverable under the Federal Rules of Civil Procedure, by claiming that it is privileged, or protected from discovery under the attorney work product doctrine or any other protective doctrine (including, but not limited to, privacy rights), that party shall prepare a "privilege log" (Fed. R. Civ. P. 26(b)(5)) setting forth the privilege relied upon and specifying separately for each document or for each category of identically situated documents:

1. The name, job title, or capacity of the author;
2. The name, job title, or capacity of each recipient;
3. The date the document was prepared and, if different, the date(s) on which it was sent to or shared with persons other than its author(s);
4. The title and description of the document;
5. The subject matter addressed in the document;
6. The purpose(s) for which it was prepared or communicated; and
7. The specific basis for the claim that it is privileged.

The privilege log will be produced as quickly as possible, but no later than 14 days after the discovery responses are due, unless the Court orders otherwise in a particular case.

g. In responding to requests for documents and materials under Rule 34 of the Federal Rules of Civil Procedure, all parties shall affirmatively state in a written response served on all other parties the full extent to which they will produce materials and shall, promptly after the production, confirm in writing that they have produced all such materials so described that are locatable after a diligent search of all locations at which such materials might plausibly exist.

3. MOTIONS

The last day to file a motion, or stipulation and proposed order to join other parties or, to amend the pleadings shall be June 18, 2007.

The last day for hearing dispositive motions shall be January 29, 2008 at 9:00 a.m. Dispositive motions shall be served and filed no later than **thirty-five (35)** days prior to the scheduled hearing date. Any opposition shall be served and filed no later than **twenty-one (21)** days prior to the hearing date. Any reply to the opposition shall be served and filed no later than **fourteen (14)** days prior to the date of the hearing.

4. ALTERNATIVE DISPUTE RESOLUTION

The parties previously stipulated to private mediation which shall be completed by July 25, 2007.

5. PRETRIAL CONFERENCE

- a. A pretrial conference shall be held on April 8, 2008 at 2:00 p.m. in Courtroom

1 E, 15th Floor. **Each party shall attend personally or by lead counsel who will try the case.** The  
2 timing of disclosures required by Federal Rule of Civil Procedure 26(a)(3) and other pretrial disclosures  
3 shall be governed by this order.

4 b. **At least thirty (30) days** prior to the date of the pretrial conference, lead counsel  
5 shall meet and confer regarding:

- 6 (1) Preparation and content of the joint pretrial conference statement;  
7 (2) Preparation and exchange of pretrial materials to be served and lodged  
8 pursuant to paragraph 5(c) below; and  
9 (3) Settlement of the action.

10 c. **At least twenty (20) days** prior to the pretrial conference, counsel and/or parties  
11 shall:

- 12 (1) Serve and file a joint pretrial statement that includes the pretrial  
13 disclosures required by Federal Rule of Civil Procedure 26(a)(3) as well  
14 as the following supplemental information:

15 (a) *The Action.*

- 16 (i) Substance of the Action. A brief description of the  
17 substance of claims and defenses which remain to be  
18 decided.

- 19 (ii) Relief Prayed. A detailed statement of all the relief  
20 claimed, particularly itemizing all elements of damages  
21 claimed as well as witnesses, documents or other  
22 evidentiary material to be presented concerning the  
23 amount of those damages.

24 (b) *The Factual Basis of the Action.*

- 25 (i) Undisputed Facts. A plain and concise statement of all  
26 relevant facts not reasonably disputable, as well as which  
27 facts parties will stipulate for incorporation into the trial  
28 record without the necessity of supporting testimony or  
exhibits.

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- (ii) Disputed Factual Issues. A plain and concise statement of all disputed factual issues which remain to be decided.
- (iii) Agreed Statement. A statement assessing whether all or part of the action may be presented upon an agreed statement of facts.
- (iv) Stipulations. A statement of stipulations requested or proposed for pretrial or trial purposes.

(c) *Disputed Legal Issues.*

Without extended legal argument, a concise statement of each disputed point of law concerning liability or relief, citing supporting statutes and decisions, and any procedural or evidentiary issues.

(d) *Trial Preparation.*

- (i) Witnesses to Be Called. With regard to witnesses disclosed pursuant to Federal Rule of Civil Procedure 26(a)(3)(A), a brief statement describing the substance of the testimony to be given.
- (ii) Estimate of Trial Time. An estimate of the number of hours needed for the presentation of each party's case, indicating possible reductions in time through proposed stipulations, agreed statements of facts, or expedited means of presenting testimony and exhibits.
- (iii) Use of Discovery Responses. Designate excerpts from discovery that the parties intend to present at trial, other than solely for impeachment or rebuttal, from depositions specifying the witness with page and line references, from interrogatory answers, or from responses to requests for admission.

(e) *Trial Alternatives and Options.*

- (i) Settlement Discussion. A statement summarizing the status of settlement negotiations and indicating whether further negotiations are likely to be productive.
- (ii) Amendments, Dismissals. A statement of requested or proposed amendments to pleadings or dismissals of parties, claims or defenses.
- (iii) Bifurcation, Separate Trial of Issues. A statement of whether bifurcation or a separate trial of specific issues is feasible and desired.

(f) *Miscellaneous.*

Any other subjects relevant to the trial of the action or material to its just, speedy and inexpensive determination.

- (2) Serve and file trial briefs, motions in limine (including any motion regarding the qualifications or testimony of any expert witness), proposed voir dire questions, jury instructions, verdict forms and excerpts from discovery that will be offered at trial (include a copy of the deposition testimony or admission). The parties shall submit proposed jury instructions **jointly**. If there are any instructions on which the parties cannot agree, those instructions may be submitted separately;
- (3) Serve and file an exhibit setting forth the qualifications and experience of each expert witness;
- (4) Serve and file a list of each party's exhibits by number (plaintiff) or letter (defendant), including a brief statement describing the substance and purpose of each exhibit and the name of the sponsoring witness;
- (5) Exchange exhibits which shall be premarked (plaintiff shall use numbers; defendant shall use letters) and tabbed. Exhibits shall be three-hole punched and shall be submitted in binders. Each exhibit shall be marked

on the front page or on the back of the last page with the information contained in Exhibit A to this Order; and

- (6) Deliver two sets of all premarked exhibits to chambers (exhibits are not to be filed).

No party shall be permitted to call any witness or offer any exhibit in its case in chief that is not disclosed in its pretrial statement, exchanged with opposing counsel, and delivered to the Court, by the above deadline, without leave of the Court and for good cause.

d. At least ten (10) days prior to the pretrial conference, after meeting and conferring in a good faith attempt to resolve any objections, counsel and/or parties shall serve and file: (1) any objections to exhibits or to the use of deposition excerpts or other discovery; (2) any objections to non-expert witnesses; (3) any objection to proposed voir dire questions, jury instructions and verdict forms that the parties have been unable in good faith to resolve; (4) any opposition to a motion in limine. No replies shall be filed.

e. All motions in limine and objections shall be heard at the pretrial conference.

6. JURY TRIAL

a. Counsel shall submit an agreed upon set of voir dire questions to be posed by the Court. Any voir dire questions on which counsel cannot agree may be submitted separately. Counsel shall be allowed brief follow-up voir dire after the Court's questioning.

b. The following jury instructions from the Manual of Model Civil Jury Instructions for the Ninth Circuit (2001 Edition) shall be given absent objection: 1.1 - 1.12, 2.1 - 2.2, 3.1 - 3.3, 3.5 - 3.7. Counsel shall submit jointly an agreed upon set of case specific instructions, using the Ninth Circuit Manual where appropriate. Do not submit duplicates of those listed above. Any instructions on which counsel cannot agree may be submitted separately. Each requested instruction shall be typed in full on a separate page with citations to the authority upon which it is based and a reference to the party submitting it. A **second blind copy** of each instruction and verdict form shall also be submitted, omitting the citation to authority and the reference to the submitting party.

7. All documents filed with the Clerk of the Court shall list the civil case number followed by the initials "EDL." One copy shall be clearly marked as a **chambers** copy. Chambers copies shall



1 be three-hole punched at the left side, suitable for insertion into standard binders. In addition, all  
2 proposed jury instructions, motions in limine, forms of verdict and trial briefs shall be accompanied by  
3 a diskette containing a copy of the document formatted in WordPerfect 6.1, 7, 8, 9 or 10 (Windows) or  
4 8.0 (Windows).

5  
6 Dated: April 17, 2007

*Elizabeth D. Laporte*  
\_\_\_\_\_  
ELIZABETH D. LAPORTE  
United States Magistrate Judge

**EXHIBIT A**

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

Case Number:

PLTF / DEFT EXHIBIT  
NO. \_\_\_\_\_

Date  
Admitted: \_\_\_\_\_

By: \_\_\_\_\_  
Lili M. Harrell, Deputy Clerk

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

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Date  
Admitted: \_\_\_\_\_

By: \_\_\_\_\_  
Lili M. Harrell, Deputy Clerk

1 MICHAEL J. VEILUVA (State Bar No. 100419)  
2 MARK D. EPSTEIN (State Bar No. 168221)  
3 ALBORG, VEILUVA & EPSTEIN LLP  
4 200 Pringle Avenue, Suite 410  
5 Walnut Creek, CA 94596  
6 Telephone: (925) 939-9880  
7 Facsimile: (925) 939-9915

8 Attorneys for Plaintiffs  
9 Andrew Shalaby and Sonia Dunn-Ruiz

10 UNITED STATES DISTRICT COURT  
11 NORTHERN DISTRICT OF CALIFORNIA

12 ANDREW SHALABY and SONIA DUNN-  
13 RUIZ,

14 Plaintiffs,

15 vs.

16 IRWIN INDUSTRIAL TOOL COMPANY,  
17 INC., THE HOME DEPOT, INC., and DOES  
18 2 through 100, inclusive

19 Defendants.

Case No. C 06-07026 EDL

**STIPULATION TO FILE FIRST  
AMENDED COMPLAINT, AND ORDER  
THEREON**

20 The parties to the above-captioned action, through their respective counsel, hereby  
21 STIPULATE AND AGREE as follows, subject to the approval of the Court:

- 22 1. That plaintiffs may file the First Amended Complaint attached as Exhibit A to this  
23 stipulation, without filing a motion for leave to file the same;  
24 2. That following the Court's entry of the order approving this stipulation, plaintiffs  
25 will electronically file the proposed First Amended Complaint with the Court; and  
26 3. That defendants will electronically file an answer to the First Amended Complaint  
27 within ten days of the filing of the First Amended Complaint.

28 //

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1 Dated: June \_\_, 2007

ALBORG, VEILUVA & EPSTEIN LLP

2 /s/

3 By: \_\_\_\_\_

MARK D. EPSTEIN  
Attorneys for Plaintiffs

4  
5 Dated: June \_\_, 2007

KELLER, PRICE & MOORHEAD

6 /s/

7 By: \_\_\_\_\_

J. PHILLIP MOORHEAD  
Attorneys for Defendants IRWIN INDUSTRIAL  
TOOLS, INC., and THE HOME DEPOT, INC.

8  
9  
10 ORDER

11 THE FOREGOING STIPULATION IS APPROVED AND IT IS SO ORDERED.

12  
13  
14 DATED: \_\_\_\_\_

UNITED STATES MAGISTRATE JUDGE

1 MICHAEL J. VEILUVA (State Bar No. 100419)  
2 MARK D. EPSTEIN (State Bar No. 168221)  
3 ALBORG, VEILUVA & EPSTEIN LLP  
4 200 Pringle Avenue, Suite 410  
5 Walnut Creek, CA 94596  
6 Telephone: (925) 939-9880  
7 Facsimile: (925) 939-9915

8 Attorneys for Plaintiffs  
9 Andrew Shalaby and Sonia Dunn-Ruiz

10 UNITED STATES DISTRICT COURT  
11 NORTHERN DISTRICT OF CALIFORNIA

12 ANDREW SHALABY and SONIA DUNN-  
13 RUIZ,

14 Plaintiffs,

15 vs.

16 IRWIN INDUSTRIAL TOOL COMPANY,  
17 INC., THE HOME DEPOT, INC., and DOES  
18 2 through 100, inclusive

19 Defendants.

Case No. C 06-07026 EDL

**FIRST AMENDED COMPLAINT**  
**(DEMAND FOR JURY TRIAL)**

20 Plaintiffs Andrew Shalaby (hereinafter "Mr. Shalaby") and Sonia Dunn-Ruiz (hereinafter  
21 "Ms. Dunn-Ruiz" – collectively "Plaintiffs"), by and through their attorneys, allege for their  
22 First Amended Complaint against defendants Irwin Industrial Tool Company, Inc., a wholly  
23 owned subsidiary of Newell Rubbermaid, Inc. (hereinafter "Irwin"), and The Home Depot, Inc.  
24 (collectively ("Defendants")) as follows:

**JURISDICTION AND VENUE**

25 1. Plaintiffs are, and at all times were, residents of the City of El Cerrito, County of  
26 Contra Costa, in the State of California.

27 2. Defendant Irwin Industrial Tool Company, Inc. is and at all times relevant to this  
28 action was, a corporation organized and existing under the laws of the State of Delaware, with its

1 principal place of business in Huntersville, North Carolina, and is a wholly owned subsidiary of  
2 Newell Rubbermaid, Inc. Plaintiffs are informed and believe, and thereon allege, that Irwin  
3 Industrial Tool Company manufactures and distributes hand tools, power tools and accessories,  
4 including MAPP Gas torches and MAPP Gas cylinders under the "BernzOmatic" brand name.

5 3. Plaintiffs are informed and believe, and thereon allege, that BernzOmatic is an  
6 unincorporated division of Irwin Industrial Tool Company

7 4. Defendant The Home Depot, Inc. is, and at all times relevant was, a corporation  
8 organized and existing under the laws of the State of Delaware, with its principal place of  
9 business in Atlanta, Georgia. Plaintiffs are informed and believe, and thereon allege, that The  
10 Home Depot, Inc. is a retail seller of hardware, appliances, building materials, gardening  
11 materials, and other home improvement supplies, which operates stores throughout the United  
12 States, including California, with stores in the cities of Emeryville (Alameda County) and El  
13 Cerrito (Contra Costa County), California. The Home Depot, Inc. sells, among other things,  
14 BernzOmatic Brand MAPP Gas torches.  
15

16 5. Plaintiffs are ignorant of the true names and capacities of defendants sued herein  
17 as DOES 2 through 100, inclusive, and therefore sues those defendants by such fictitious names.  
18 Plaintiffs will amend this complaint to allege the true names and capacities of said defendants if  
19 and when that information is ascertained.  
20

21 6. Plaintiffs are informed and believe that at all times mentioned herein, defendants  
22 and each of them were the agents, servants, joint venturers, authorized representatives, delegates  
23 and/or successors of the other defendants named herein, and were acting within the course and  
24 scope of said agency, service, joint venture, representation, delegation and/or succession.  
25

26 7. The court has original jurisdiction of this action under 28 U.S.C. § 1332, based  
27 upon the parties' complete diversity of citizenship, in that it is a civil action between citizens of  
28

1 different states in which the amount in controversy exceeds the sum of \$75,000, exclusive of  
2 interest and costs.

3 8. Venue is proper in the Northern District of California, pursuant to 28 U.S.C. §  
4 1441(a), as well as Civil Local Rules 3-2 (c) and (d), on the grounds that this action was  
5 commenced in the Superior Court of the State of California, in and for the County of Alameda,  
6 and was subsequently removed to this Court by defendants pursuant to 28 U.S.C. § 1441(a).

7  
8 **FACTUAL ALLEGATIONS**

9 9. Sometime in early to mid 2005, Mr. Shalaby purchased a BernzOmatic brand.  
10 MAPP Gas torch kit from a Home Depot store near his home in El Cerrito, California. The torch  
11 kit included the two components of a BernzOmatic MAPP Gas torch: a yellow colored MAPP  
12 Gas canister, or cylinder, and a torch head assembly ("torch"), the tip of which emits a flame  
13 when the torch is in use. The flame is intended to be used for soldering, welding, and other  
14 purposes that are described on the cylinder labels, on BernzOmatic internet website:  
15 <http://www.bernzomatic.com>, and in other product related instructions and promotional  
16 materials.

17  
18 10. The BernzOmatic torch is designed and intended to be screwed on to a threaded  
19 metal neck of the MAPP Gas cylinder. Once attached to the cylinder, the torch is designed and  
20 intended to be ignited when the user activates a trigger switch that is a part of the torch assembly.

21 11. Soon after Mr. Shalaby purchased the BernzOmatic torch kit from Home Depot,  
22 he purchased several replacement BernzOmatic MAPP Gas cylinders from Home Depot and/or  
23 Ace Hardware to use once the original cylinder that came with the torch kit was depleted of  
24 MAPP Gas.

25  
26 12. Plaintiffs and their two children are avid campers. They own a recreational  
27 vehicle which they use on a regular basis to tour and park for overnight stays at designated  
28 campgrounds that accommodate recreational vehicles.

1           13. While camping, Plaintiffs regularly light wood campfires in the evenings. Up  
2 until April 21, 2006, Mr. Shalaby typically ignited the family's campfires by using his  
3 BernzOmatic MAPP Gas torch to ignite the firewood. Mr. Shalaby stored the torch in a wooden  
4 box, along with the auxiliary MAPP Gas canisters, which Plaintiffs kept inside of their  
5 recreational vehicle.

6           14. The MAPP Gas torch kit contained a written representation that, among other  
7 things, one of the intended and/or acceptable uses of the torch was for "lighting grills." By  
8 making this representation, BernzOmatic intended for consumers to use its MAPP Gas torches to  
9 start cooking and/or recreational campfires, and knew or should have known that some  
10 consumers would use its torches in the manner that Mr. Shalaby used his torch at the time of the  
11 incident which is the subject of this lawsuit, as set forth in more detail herein below.  
12

13           15. Neither the torch nor the MAPP Gas cylinder contained a warning against using  
14 the torch to ignite a wood campfire.

15           16. Defendants and each of them at all times herein mentioned knew and intended  
16 that the BernzOmatic Brand MAPP Gas torches that they designed, manufactured, marketed and  
17 sold would be purchased and used by consumers without the requisite knowledge of what  
18 constitutes material defects in the product, and thus without inspection for defects therein or in  
19 any of its component parts.  
20

21           17. The MAPP Gas torch and/or cylinder at issue in this case was, at the time Mr.  
22 Shalaby purchased it, defective and unsafe for its intended purposes in that the design,  
23 manufacture and/or workmanship of the torch or its component parts were such that, without any  
24 misuse of or abuse to the product on the part of the user, the contents of the cylinder allowed to  
25 discharge instantaneously and become ignited upon activation of the torch ignition switch.  
26

27           18. Between the date on which he purchased the MAPP Gas torch kit and April 21,  
28 2006, Mr. Shalaby used the torch to ignite campfires on many occasions.



1 **A. The Incident**

2 19. During the week of April 17, 2006, Plaintiffs were vacationing at the "Campland  
3 on the Bay" recreational vehicle resort, located at 2211 Pacific Beach Drive in San Diego,  
4 California.

5 20. On or about the evening of April 21, 2006, Mr. Shalaby was seriously injured  
6 when he activated the trigger switch on his BernzOmatic MAPP Gas torch in order to light a  
7 wood campfire in a designated campfire pit, located within the campsite at the Campland  
8 complex where Plaintiffs were staying. Mr. Shalaby activated the trigger switch on the torch  
9 when the MAPP Gas cylinder suddenly, instantaneously, and without warning, exploded and/or  
10 discharged its contents, which caught fire. The heated MAPP Gas and fire enveloped Mr.  
11 Shalaby, and caused severe burns to his face, limbs, and extremities.

12 **B. Ms. Dunn-Ruiz Witnessed the Incident**

13 21. Ms. Dunn-Ruiz was less than ten feet away from Mr. Shalaby when the  
14 BernzOmatic cylinder exploded and/or instantaneously discharged its contents and enveloped  
15 Mr. Shalaby in heated MAPP Gas and fire. While she had her back turned to her husband at the  
16 moment the explosion and/or gas discharge occurred, Ms. Dunn-Ruiz heard the noise from the  
17 explosion and/or gas discharged, and turned around within seconds to see her husband enveloped  
18 in flames.

19 **C. Plaintiffs' Damages**

20 22. Mr. Shalaby was confined to a hospital for approximately three weeks after the  
21 incident of April 21, 2006 involving the BernzOmatic torch and MAPP Gas cylinder, receiving  
22 medical treatment for his injuries, including but not limited to painful skin grafts and surgeries,  
23 as well as treatments for infections and other medical complications that were proximately  
24 caused by the incident. Mr. Shalaby was bedridden for several weeks thereafter. During his  
25 time in the hospital, Mr. Shalaby incurred in excess of \$300,000 in medical expenses, and he  
26 continues to incur medical substantial expenses in connection with ongoing medical treatment  
27 for his injuries.  
28

1           23.     At all times mentioned herein, Mr. Shalaby was and remains a self-employed  
2 attorney at law with an active litigation practice. During the time he was confined to the  
3 hospital, Mr. Shalaby was unable to work and, as a result, lost a substantial amount of income.  
4 Since being discharged from the hospital, Mr. Shalaby's ability to resume his law practice has  
5 been limited due to the physical and emotional injuries he sustained as a result of the April 21,  
6 2006 incident involving the BernzOmatic torch and MAPP Gas cylinder. Mr. Shalaby was  
7 recently able to resume practicing law on a limited basis, but he continues to lose a substantial  
8 amount of business and income due to his limited ability to practice law on a full time basis. Mr.  
9 Shalaby will continue to lose income as a result of the injuries he sustained from the  
10 BernzOmatic MAPP Gas torch for an indefinite period of time.

11           24.     Mr. Shalaby has suffered mental anguish and emotional injuries as a result of the  
12 April 21, 2006 incident with the BernzOmatic torch and MAPP Gas cylinder, including but not  
13 limited to Post Traumatic Stress Disorder, for which he has sought treatment. Mr. Shalaby has  
14 incurred, and continues to incur, out-of-pocket expenses for the treatment of his emotional  
15 injuries.

16           25.     Ms. Dunn-Ruiz has suffered mental anguish and emotional injuries as a result of  
17 witnessing her husband burn as a result of the April 21, 2006 incident with the BernzOmatic  
18 torch and MAPP Gas cylinder while standing in close proximity to her husband.

19  
20                   **FIRST CAUSE OF ACTION -- STRICT PRODUCTS LIABILITY**  
21                   **(By Mr. Shalaby Against Irwin Industrial Tools and Home Depot)**

22           26.     Plaintiffs incorporate by this reference the allegations, and each of them,  
23 contained in paragraphs 1 through 25 above, as though fully set forth herein.

24           27.     At all times mentioned in this complaint, the BernzOmatic Brand MAPP Gas  
25 torch and/or cylinder that caused Mr. Shalaby's injuries and/or its component parts, were  
26 defective as to design, manufacture, and warnings, which caused the torch, cylinder and/or their  
27  
28

1 component parts to be in a dangerous and defective condition and prone to failure, which made  
2 them unsafe for their intended use.

3 28. Plaintiffs are informed and believe that the torch and/or cylinder contained one or  
4 more manufacturing defects when they left the possession of Irwin Industrial Tools, Home Depot  
5 and/or DOES 2 through 100 (collectively "Defendants") in that the torch and/or cylinder differed  
6 from the intended design and specifications, and/or from other typical units of the same product  
7 line.

8 29. Plaintiffs are further informed and believe that the design of the BernzOmatic  
9 torch and/or MAPP Gas cylinder that caused Mr. Shalaby's injuries was defective because the  
10 torch and/or cylinder did not perform as safely as an ordinary consumer would have expected  
11 them to perform when used in the manner that Mr. Shalaby did at the time of the April 21, 2006  
12 incident which is the subject of this case.

13 30. Defendants, and each of them, designed, manufactured, distributed, marketed  
14 and/or sold the torch and cylinder, and the torch and/or cylinder contained one or more  
15 manufacturing and/or design defects when they left Defendants' possession.  
16

17 31. As a direct and proximate result of the defective and dangerous condition of torch,  
18 cylinder and/or their component parts as described above, Mr. Shalaby sustained the following  
19 serious injuries and damages from using the torch in an intended manner:  
20

21 a. Deep burns over 22% of his body surface, including his face, hands, arms  
22 and legs, requiring surgical repair, skin grafts and continuing medical treatment;

23 b. physical pain and discomfort;

24 c. immobility;

25 d. disfigurement;

26 e. lost wages; and  
27  
28

1 f. emotional trauma and mental anguish, including but not limited to Post  
2 Traumatic Stress Disorder.

3 **SECOND CAUSE OF ACTION -- STRICT LIABILITY FOR FAILURE TO WARN**  
4 **(By Mr. Shalaby Against Irwin Industrial Tools and Home Depot)**

5 32. Plaintiffs incorporate by this reference the allegations, and each of them,  
6 contained in paragraphs 1 through 31 above, as though fully set forth herein.

7 33. The BernzOmatic torch and MAPP Gas cylinder that caused Mr. Shalaby's  
8 injuries lacked sufficient instructions or warnings of the potential risk and danger that the  
9 cylinder might suddenly and instantaneously discharge its contents and catch fire when used in  
10 an intended and foreseeable manner.

11 34. This danger and risk were known or should have been known to Defendants at the  
12 time the torch and MAPP Gas cylinder were designed, manufactured, distributed, marketed and  
13 sold.

14 35. These risks presented a substantial danger to purchasers and users of the torch that  
15 ordinary consumers would not have recognized or expected, particularly without an adequate  
16 warning.

17 36. Mr. Shalaby was injured when he used the torch in a manner that was intended  
18 and foreseeable to Defendants.

19 37. The lack of sufficient instructions or warnings was a substantial factor in causing  
20 Mr. Shalaby's injuries.

21 **THIRD CAUSE OF ACTION – NEGLIGENCE**  
22 **(By Mr. Shalaby Against Irwin Industrial Tools)**

23 38. Plaintiffs incorporate by this reference the allegations, and each of them,  
24 contained in paragraphs 1 through 37 above, as though fully set forth herein.

1 39. Irwin Industrial Tools, whose BernzOmatic division designed, manufactured,  
2 distributed, marketed and/or sold the BernzOmatic Brand torch and MAPP Gas cylinder that  
3 caused Mr. Shalaby's injuries.

4 40. Irwin Industrial Tools was negligent in designing and/or manufacturing the torch  
5 and MAPP Gas cylinder in that they failed to use the amount of care in designing and/or  
6 manufacturing the torch and cylinder that a reasonably careful designer and manufacturer would  
7 use in similar circumstances to avoid exposing others to a foreseeable risk of harm.

8 41. Mr. Shalaby was harmed as a proximate result of Irwin Industrial Tools'  
9 negligence when the BernzOmatic Brand MAPP Gas cylinder exploded and instantaneously  
10 discharged its contents upon Mr. Shalaby's activation of the torch trigger switch.

11 42. The negligence of Industrial Tools' was a substantial factor in causing Mr.  
12 Shalaby's injuries.  
13

14 **FOURTH CAUSE OF ACTION – NEGLIGENT FAILURE TO WARN**  
15 **(By Mr. Shalaby Against Irwin Industrial Tools and Home Depot)**

16 43. Plaintiffs incorporate by this reference the allegations, and each of them,  
17 contained in paragraphs 1 through 42 above, as though fully set forth herein.

18 44. Defendants, and each of them, were negligent by not using reasonable care to  
19 adequately warn or instruct consumer's about the dangerous condition(s) in the BernzOmatic  
20 Brand MAPP Gas torch's and/or cylinder that caused Mr. Shalaby's injuries, or about  
21 circumstances that are likely to make the consumer's use of the torch dangerous.  
22

23 45. Defendants, and each of them, knew or reasonably should have known that the  
24 torch presented an unreasonable danger of exploding, or was likely to explode, when used in a  
25 reasonably foreseeable manner.  
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28

1           46. Defendants knew or reasonably should have known that users of the torch would  
2 not realize this danger, yet failed to adequately warn of the danger or instruct users on the safe  
3 use of the torch to prevent the type of injuries that Mr. Shalaby has sustained.

4           47. A reasonable designer, manufacturer, marketer, distributor and seller would have  
5 warned of this danger, or instructed users on the safe use of the torch, to prevent that type of  
6 injuries that Mr. Shalaby has sustained.

7                   **FIFTH CAUSE OF ACTION – BREACH OF IMPLIED WARRANTY OF**  
8                   **MERCHANTABILITY**

9                   **(By Mr. Shalaby Against Irwin Industrial Tools and Home Depot)**

10           48. Plaintiffs incorporate by this reference the allegations, and each of them,  
11 contained in paragraphs 1 through 47 above, as though fully set forth herein.

12           49. Mr. Shalaby was proximately harmed by the BernzOmatic Brand torch and  
13 MAPP Gas cylinder used in the April 21, 2006 incident because the torch and cylinder did not  
14 have the qualities, reliability and safety that a reasonable consumer would expect.

15           50. At the time he purchased the torch, Defendants were in the business of selling  
16 BernzOmatic Brand torches and MAPP Gas cylinders.

17           51. The BernzOmatic torch and MAPP Gas cylinder that caused Mr. Shalaby's  
18 injuries were not of the same quality as those generally acceptable in the industry, and were not  
19 fit for the ordinary purposes for which such products are used.

20           52. The failure of the torch to have the expected quality that it should have had was a  
21 substantial factor in causing Mr. Shalaby's injuries.

22                   **SIXTH CAUSE OF ACTION –**  
23                   **NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS**

24                   **(By Plaintiffs Against All Defendants)**

25           53. Plaintiffs incorporate by this reference the allegations, and each of them,  
26 contained in paragraphs 1 through 52 above, as though fully set forth herein.  
27  
28

1           54. Defendants, and each of them, were negligent in designing, manufacturing,  
2 distributing and selling the defective BernzOmatic Brand torch and MAPP Gas cylinder that  
3 caused Mr. Shalaby's injuries.

4           55. Ms. Dunn-Ruiz was present at the scene of the April 21, 2006 incident involving  
5 the explosion and/or instantaneous discharge of the contents of the MAPP Gas cylinder in Mr.  
6 Shalaby's hands, when it occurred, and was aware at the time that her husband was sustaining  
7 severe and life threatening injuries.

8           56. Both Mr. Shalaby and Ms. Dunn-Ruiz suffered serious emotional distress as a  
9 result of experiencing and observing the April 21, 2006 incident, respectively, including severe  
10 mental suffering, grief, anguish, anxiety, depression, worry, shock, and in the case of Mr.  
11 Shalaby, Post Traumatic Stress Disorder.

12           57. The negligence of Defendants in designing, manufacturing, distributing,  
13 marketing and selling the defective torch and/or MAPP Gas cylinder was a substantial factor in  
14 causing Plaintiffs' serious emotional distress.  
15

16           Wherefore, Plaintiffs DEMAND A JURY TRIAL, and pray that a judgment be entered  
17 against Defendants, and each of them, as follows:  
18

19           1. For general damages, including but not limited to damages for emotional distress,  
20 pain and suffering, according to proof;

21           2. For special damages, including but not limited to out of pocket medical expenses  
22 and incidental expenses related to Mr. Shalaby's injuries, and lost income, according to proof;  
23

24           3. For exemplary damages;

25           4. For prejudgment interest according to law;

26           5. For costs of suit incurred in this action; and  
27  
28

By: MARK D. EPSTEIN  
Attorneys for Plaintiffs



1 MICHAEL J. VEILUVA (State Bar No. 100419)  
2 MARK D. EPSTEIN (State Bar No. 168221)  
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4 200 Pringle Avenue, Suite 410  
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7 Facsimile: (925) 939-9915

8 Attorneys for Plaintiffs  
9 Andrew Shalaby and Sonia Dunn-Ruiz

10 UNITED STATES DISTRICT COURT  
11 NORTHERN DISTRICT OF CALIFORNIA

12 ANDREW SHALABY and SONIA DUNN-  
13 RUIZ,

14 Plaintiffs,

15 vs.

16 IRWIN INDUSTRIAL TOOL COMPANY,  
17 INC., THE HOME DEPOT, INC., and DOES  
18 2 through 100, inclusive

19 Defendants.

Case No. C 06-07026 EDL

**STIPULATION TO FILE FIRST  
AMENDED COMPLAINT, AND ORDER  
THEREON**

20 The parties to the above-captioned action, through their respective counsel, hereby  
21 STIPULATE AND AGREE as follows, subject to the approval of the Court:

22 1. That plaintiffs may file the First Amended Complaint attached as Exhibit A to this  
23 stipulation, without filing a motion for leave to file the same;

24 2. That following the Court's entry of the order approving this stipulation, plaintiffs  
25 will electronically file the proposed First Amended Complaint with the Court; and

26 3. That defendants will electronically file an answer to the First Amended Complaint  
27 within ten days of the filing of the First Amended Complaint.

28 //

//

//

1 Dated: June \_\_, 2007

ALBORG, VEILUVA & EPSTEIN LLP

2 /s/

3 By: \_\_\_\_\_

MARK D. EPSTEIN  
Attorneys for Plaintiffs

4  
5 Dated: June \_\_, 2007

KELLER, PRICE & MOORHEAD

6 /s/

7 By: \_\_\_\_\_

J. PHILLIP MOORHEAD  
Attorneys for Defendants IRWIN INDUSTRIAL  
TOOLS, INC., and THE HOME DEPOT, INC.

10 ORDER

11 THE FOREGOING STIPULATION IS APPROVED AND IT IS SO ORDERED.

12  
13  
14 DATED: June 8, 2007

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28  
UNITED STATES MAGISTRATE JUDGE



1 MICHAEL J. VEILUVA (State Bar No. 100419)  
2 MARK D. EPSTEIN (State Bar No. 168221)  
3 ALBORG, VEILUVA & EPSTEIN LLP  
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8 Attorneys for Plaintiffs  
9 Andrew Shalaby and Sonia Dunn-Ruiz

10 UNITED STATES DISTRICT COURT  
11 NORTHERN DISTRICT OF CALIFORNIA

12 ANDREW SHALABY and SONIA DUNN-  
13 RUIZ,

14 Plaintiffs,

15 vs.

16 IRWIN INDUSTRIAL TOOL COMPANY,  
17 INC., THE HOME DEPOT, INC., and DOES  
18 2 through 100, inclusive

19 Defendants.

Case No. C 06-07026 EDL

**FIRST AMENDED COMPLAINT**  
**(DEMAND FOR JURY TRIAL)**

20 Plaintiffs Andrew Shalaby (hereinafter "Mr. Shalaby") and Sonia Dunn-Ruiz (hereinafter  
21 "Ms. Dunn-Ruiz" – collectively "Plaintiffs"), by and through their attorneys, allege for their  
22 First Amended Complaint against defendants Irwin Industrial Tool Company, Inc., a wholly  
23 owned subsidiary of Newell Rubbermaid, Inc. (hereinafter "Irwin"), and The Home Depot, Inc.  
24 (collectively ("Defendants")) as follows:

**JURISDICTION AND VENUE**

25 1. Plaintiffs are, and at all times were, residents of the City of El Cerrito, County of  
26 Contra Costa, in the State of California.

27 2. Defendant Irwin Industrial Tool Company, Inc. is and at all times relevant to this  
28 action was, a corporation organized and existing under the laws of the State of Delaware, with its

1 principal place of business in Huntersville, North Carolina, and is a wholly owned subsidiary of  
2 Newell Rubbermaid, Inc. Plaintiffs are informed and believe, and thereon allege, that Irwin  
3 Industrial Tool Company manufactures and distributes hand tools, power tools and accessories,  
4 including MAPP Gas torches and MAPP Gas cylinders under the "BernzOmatic" brand name.

5 3. Plaintiffs are informed and believe, and thereon allege, that BernzOmatic is an  
6 unincorporated division of Irwin Industrial Tool Company

7 4. Defendant The Home Depot, Inc. is, and at all times relevant was, a corporation  
8 organized and existing under the laws of the State of Delaware, with its principal place of  
9 business in Atlanta, Georgia. Plaintiffs are informed and believe, and thereon allege, that The  
10 Home Depot, Inc. is a retail seller of hardware, appliances, building materials, gardening  
11 materials, and other home improvement supplies, which operates stores throughout the United  
12 States, including California, with stores in the cities of Emeryville (Alameda County) and El  
13 Cerrito (Contra Costa County), California. The Home Depot, Inc. sells, among other things,  
14 BernzOmatic Brand MAPP Gas torches.  
15

16 5. Plaintiffs are ignorant of the true names and capacities of defendants sued herein  
17 as DOES 2 through 100, inclusive, and therefore sues those defendants by such fictitious names.  
18 Plaintiffs will amend this complaint to allege the true names and capacities of said defendants if  
19 and when that information is ascertained.  
20

21 6. Plaintiffs are informed and believe that at all times mentioned herein, defendants  
22 and each of them were the agents, servants, joint venturers, authorized representatives, delegates  
23 and/or successors of the other defendants named herein, and were acting within the course and  
24 scope of said agency, service, joint venture, representation, delegation and/or succession.  
25

26 7. The court has original jurisdiction of this action under 28 U.S.C. § 1332, based  
27 upon the parties' complete diversity of citizenship, in that it is a civil action between citizens of  
28

1 different states in which the amount in controversy exceeds the sum of \$75,000, exclusive of  
2 interest and costs.

3 8. Venue is proper in the Northern District of California, pursuant to 28 U.S.C. §  
4 1441(a), as well as Civil Local Rules 3-2 (c) and (d), on the grounds that this action was  
5 commenced in the Superior Court of the State of California, in and for the County of Alameda,  
6 and was subsequently removed to this Court by defendants pursuant to 28 U.S.C. § 1441(a).

7  
8 **FACTUAL ALLEGATIONS**

9 9. Sometime in early to mid 2005, Mr. Shalaby purchased a BernzOmatic brand  
10 MAPP Gas torch kit from a Home Depot store near his home in El Cerrito, California. The torch  
11 kit included the two components of a BernzOmatic MAPP Gas torch: a yellow colored MAPP  
12 Gas canister, or cylinder, and a torch head assembly ("torch"), the tip of which emits a flame  
13 when the torch is in use. The flame is intended to be used for soldering, welding, and other  
14 purposes that are described on the cylinder labels, on BernzOmatic internet website:  
15 <http://www.bernzomatic.com>, and in other product related instructions and promotional  
16 materials.

17  
18 10. The BernzOmatic torch is designed and intended to be screwed on to a threaded  
19 metal neck of the MAPP Gas cylinder. Once attached to the cylinder, the torch is designed and  
20 intended to be ignited when the user activates a trigger switch that is a part of the torch assembly.

21 11. Soon after Mr. Shalaby purchased the BernzOmatic torch kit from Home Depot,  
22 he purchased several replacement BernzOmatic MAPP Gas cylinders from Home Depot and/or  
23 Ace Hardware to use once the original cylinder that came with the torch kit was depleted of  
24 MAPP Gas.

25  
26 12. Plaintiffs and their two children are avid campers. They own a recreational  
27 vehicle which they use on a regular basis to tour and park for overnight stays at designated  
28 campgrounds that accommodate recreational vehicles.

1           13. While camping, Plaintiffs regularly light wood campfires in the evenings. Up  
2 until April 21, 2006, Mr. Shalaby typically ignited the family's campfires by using his  
3 BernzOmatic MAPP Gas torch to ignite the firewood. Mr. Shalaby stored the torch in a wooden  
4 box, along with the auxiliary MAPP Gas canisters, which Plaintiffs kept inside of their  
5 recreational vehicle.

6           14. The MAPP Gas torch kit contained a written representation that, among other  
7 things, one of the intended and/or acceptable uses of the torch was for "lighting grills." By  
8 making this representation, BernzOmatic intended for consumers to use its MAPP Gas torches to  
9 start cooking and/or recreational campfires, and knew or should have known that some  
10 consumers would use its torches in the manner that Mr. Shalaby used his torch at the time of the  
11 incident which is the subject of this lawsuit, as set forth in more detail herein below.

12           15. Neither the torch nor the MAPP Gas cylinder contained a warning against using  
13 the torch to ignite a wood campfire.

14           16. Defendants and each of them at all times herein mentioned knew and intended  
15 that the BernzOmatic Brand MAPP Gas torches that they designed, manufactured, marketed and  
16 sold would be purchased and used by consumers without the requisite knowledge of what  
17 constitutes material defects in the product, and thus without inspection for defects therein or in  
18 any of its component parts.

19           17. The MAPP Gas torch and/or cylinder at issue in this case was, at the time Mr.  
20 Shalaby purchased it, defective and unsafe for its intended purposes in that the design,  
21 manufacture and/or workmanship of the torch or its component parts were such that, without any  
22 misuse of or abuse to the product on the part of the user, the contents of the cylinder allowed to  
23 discharge instantaneously and become ignited upon activation of the torch ignition switch.

24           18. Between the date on which he purchased the MAPP Gas torch kit and April 21,  
25 2006, Mr. Shalaby used the torch to ignite campfires on many occasions.  
26  
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28

1 **A. The Incident**

2 19. During the week of April 17, 2006, Plaintiffs were vacationing at the "Campland  
3 on the Bay" recreational vehicle resort, located at 2211 Pacific Beach Drive in San Diego,  
4 California.

5 20. On or about the evening of April 21, 2006, Mr. Shalaby was seriously injured  
6 when he activated the trigger switch on his BernzOmatic MAPP Gas torch in order to light a  
7 wood campfire in a designated campfire pit, located within the campsite at the Campland  
8 complex where Plaintiffs were staying. Mr. Shalaby activated the trigger switch on the torch  
9 when the MAPP Gas cylinder suddenly, instantaneously, and without warning, exploded and/or  
10 discharged its contents, which caught fire. The heated MAPP Gas and fire enveloped Mr.  
11 Shalaby, and caused severe burns to his face, limbs, and extremities.

12 **B. Ms. Dunn-Ruiz Witnessed the Incident**

13 21. Ms. Dunn-Ruiz was less than ten feet away from Mr. Shalaby when the  
14 BernzOmatic cylinder exploded and/or instantaneously discharged its contents and enveloped  
15 Mr. Shalaby in heated MAPP Gas and fire. While she had her back turned to her husband at the  
16 moment the explosion and/or gas discharge occurred, Ms. Dunn-Ruiz heard the noise from the  
17 explosion and/or gas discharged, and turned around within seconds to see her husband enveloped  
18 in flames.

19 **C. Plaintiffs' Damages**

20 22. Mr. Shalaby was confined to a hospital for approximately three weeks after the  
21 incident of April 21, 2006 involving the BernzOmatic torch and MAPP Gas cylinder, receiving  
22 medical treatment for his injuries, including but not limited to painful skin grafts and surgeries,  
23 as well as treatments for infections and other medical complications that were proximately  
24 caused by the incident. Mr. Shalaby was bedridden for several weeks thereafter. During his  
25 time in the hospital, Mr. Shalaby incurred in excess of \$300,000 in medical expenses, and he  
26 continues to incur medical substantial expenses in connection with ongoing medical treatment  
27 for his injuries.  
28

1           23.     At all times mentioned herein, Mr. Shalaby was and remains a self-employed  
2 attorney at law with an active litigation practice. During the time he was confined to the  
3 hospital, Mr. Shalaby was unable to work and, as a result, lost a substantial amount of income.  
4 Since being discharged from the hospital, Mr. Shalaby's ability to resume his law practice has  
5 been limited due to the physical and emotional injuries he sustained as a result of the April 21,  
6 2006 incident involving the BernzOmatic torch and MAPP Gas cylinder. Mr. Shalaby was  
7 recently able to resume practicing law on a limited basis, but he continues to lose a substantial  
8 amount of business and income due to his limited ability to practice law on a full time basis. Mr.  
9 Shalaby will continue to lose income as a result of the injuries he sustained from the  
10 BernzOmatic MAPP Gas torch for an indefinite period of time.

11           24.     Mr. Shalaby has suffered mental anguish and emotional injuries as a result of the  
12 April 21, 2006 incident with the BernzOmatic torch and MAPP Gas cylinder, including but not  
13 limited to Post Traumatic Stress Disorder, for which he has sought treatment. Mr. Shalaby has  
14 incurred, and continues to incur, out-of-pocket expenses for the treatment of his emotional  
15 injuries.

16           25.     Ms. Dunn-Ruiz has suffered mental anguish and emotional injuries as a result of  
17 witnessing her husband burn as a result of the April 21, 2006 incident with the BernzOmatic  
18 torch and MAPP Gas cylinder while standing in close proximity to her husband.

19  
20                   **FIRST CAUSE OF ACTION -- STRICT PRODUCTS LIABILITY**  
21                   **(By Mr. Shalaby Against Irwin Industrial Tools and Home Depot)**

22           26.     Plaintiffs incorporate by this reference the allegations, and each of them,  
23 contained in paragraphs 1 through 25 above, as though fully set forth herein.

24           27.     At all times mentioned in this complaint, the BernzOmatic Brand MAPP Gas  
25 torch and/or cylinder that caused Mr. Shalaby's injuries and/or its component parts, were  
26 defective as to design, manufacture, and warnings, which caused the torch, cylinder and/or their  
27  
28



1 component parts to be in a dangerous and defective condition and prone to failure, which made  
2 them unsafe for their intended use.

3 28. Plaintiffs are informed and believe that the torch and/or cylinder contained one or  
4 more manufacturing defects when they left the possession of Irwin Industrial Tools, Home Depot  
5 and/or DOES 2 through 100 (collectively "Defendants") in that the torch and/or cylinder differed  
6 from the intended design and specifications, and/or from other typical units of the same product  
7 line.

8 29. Plaintiffs are further informed and believe that the design of the BernzOmatic  
9 torch and/or MAPP Gas cylinder that caused Mr. Shalaby's injuries was defective because the  
10 torch and/or cylinder did not perform as safely as an ordinary consumer would have expected  
11 them to perform when used in the manner that Mr. Shalaby did at the time of the April 21, 2006  
12 incident which is the subject of this case.

13 30. Defendants, and each of them, designed, manufactured, distributed, marketed  
14 and/or sold the torch and cylinder, and the torch and/or cylinder contained one or more  
15 manufacturing and/or design defects when they left Defendants' possession.  
16

17 31. As a direct and proximate result of the defective and dangerous condition of torch,  
18 cylinder and/or their component parts as described above, Mr. Shalaby sustained the following  
19 serious injuries and damages from using the torch in an intended manner:  
20

21 a. Deep burns over 22% of his body surface, including his face, hands, arms  
22 and legs, requiring surgical repair, skin grafts and continuing medical treatment;

23 b. physical pain and discomfort;

24 c. immobility;

25 d. disfigurement;

26 e. lost wages; and  
27  
28

1 f. emotional trauma and mental anguish, including but not limited to Post  
2 Traumatic Stress Disorder.

3 **SECOND CAUSE OF ACTION -- STRICT LIABILITY FOR FAILURE TO WARN**  
4 **(By Mr. Shalaby Against Irwin Industrial Tools and Home Depot)**

5 32. Plaintiffs incorporate by this reference the allegations, and each of them,  
6 contained in paragraphs 1 through 31 above, as though fully set forth herein.

7 33. The BernzOmatic torch and MAPP Gas cylinder that caused Mr. Shalaby's  
8 injuries lacked sufficient instructions or warnings of the potential risk and danger that the  
9 cylinder might suddenly and instantaneously discharge its contents and catch fire when used in  
10 an intended and foreseeable manner.

11 34. This danger and risk were known or should have been known to Defendants at the  
12 time the torch and MAPP Gas cylinder were designed, manufactured, distributed, marketed and  
13 sold.

14 35. These risks presented a substantial danger to purchasers and users of the torch that  
15 ordinary consumers would not have recognized or expected, particularly without an adequate  
16 warning.

17 36. Mr. Shalaby was injured when he used the torch in a manner that was intended  
18 and foreseeable to Defendants.

19 37. The lack of sufficient instructions or warnings was a substantial factor in causing  
20 Mr. Shalaby's injuries.

21 **THIRD CAUSE OF ACTION – NEGLIGENCE**  
22 **(By Mr. Shalaby Against Irwin Industrial Tools)**

23 38. Plaintiffs incorporate by this reference the allegations, and each of them,  
24 contained in paragraphs 1 through 37 above, as though fully set forth herein.

1 39. Irwin Industrial Tools, whose BernzOmatic division designed, manufactured,  
2 distributed, marketed and/or sold the BernzOmatic Brand torch and MAPP Gas cylinder that  
3 caused Mr. Shalaby's injuries.

4 40. Irwin Industrial Tools was negligent in designing and/or manufacturing the torch  
5 and MAPP Gas cylinder in that they failed to use the amount of care in designing and/or  
6 manufacturing the torch and cylinder that a reasonably careful designer and manufacturer would  
7 use in similar circumstances to avoid exposing others to a foreseeable risk of harm.

8 41. Mr. Shalaby was harmed as a proximate result of Irwin Industrial Tools'  
9 negligence when the BernzOmatic Brand MAPP Gas cylinder exploded and instantaneously  
10 discharged its contents upon Mr. Shalaby's activation of the torch trigger switch.

11 42. The negligence of Industrial Tools' was a substantial factor in causing Mr.  
12 Shalaby's injuries.  
13

14 **FOURTH CAUSE OF ACTION – NEGLIGENT FAILURE TO WARN**  
15 **(By Mr. Shalaby Against Irwin Industrial Tools and Home Depot)**

16 43. Plaintiffs incorporate by this reference the allegations, and each of them,  
17 contained in paragraphs 1 through 42 above, as though fully set forth herein.

18 44. Defendants, and each of them, were negligent by not using reasonable care to  
19 adequately warn or instruct consumer's about the dangerous condition(s) in the BernzOmatic  
20 Brand MAPP Gas torch's and/or cylinder that caused Mr. Shalaby's injuries, or about  
21 circumstances that are likely to make the consumer's use of the torch dangerous.  
22

23 45. Defendants, and each of them, knew or reasonably should have known that the  
24 torch presented an unreasonable danger of exploding, or was likely to explode, when used in a  
25 reasonably foreseeable manner.  
26  
27  
28

1 46. Defendants knew or reasonably should have known that users of the torch would  
2 not realize this danger, yet failed to adequately warn of the danger or instruct users on the safe  
3 use of the torch to prevent the type of injuries that Mr. Shalaby has sustained.

4 47. A reasonable designer, manufacturer, marketer, distributor and seller would have  
5 warned of this danger, or instructed users on the safe use of the torch, to prevent that type of  
6 injuries that Mr. Shalaby has sustained.

7 **FIFTH CAUSE OF ACTION – BREACH OF IMPLIED WARRANTY OF**  
8 **MERCHANTABILITY**

9 **(By Mr. Shalaby Against Irwin Industrial Tools and Home Depot)**

10 48. Plaintiffs incorporate by this reference the allegations, and each of them,  
11 contained in paragraphs 1 through 47 above, as though fully set forth herein.

12 49. Mr. Shalaby was proximately harmed by the BernzOmatic Brand torch and  
13 MAPP Gas cylinder used in the April 21, 2006 incident because the torch and cylinder did not  
14 have the qualities, reliability and safety that a reasonable consumer would expect.

15 50. At the time he purchased the torch, Defendants were in the business of selling  
16 BernzOmatic Brand torches and MAPP Gas cylinders.

17 51. The BernzOmatic torch and MAPP Gas cylinder that caused Mr. Shalaby's  
18 injuries were not of the same quality as those generally acceptable in the industry, and were not  
19 fit for the ordinary purposes for which such products are used.

20 52. The failure of the torch to have the expected quality that it should have had was a  
21 substantial factor in causing Mr. Shalaby's injuries.

22 **SIXTH CAUSE OF ACTION –**  
23 **NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS**

24 **(By Plaintiffs Against All Defendants)**

25 53. Plaintiffs incorporate by this reference the allegations, and each of them,  
26 contained in paragraphs 1 through 52 above, as though fully set forth herein.

1           54. Defendants, and each of them, were negligent in designing, manufacturing,  
2 distributing and selling the defective BernzOmatic Brand torch and MAPP Gas cylinder that  
3 caused Mr. Shalaby's injuries.

4           55. Ms. Dunn-Ruiz was present at the scene of the April 21, 2006 incident involving  
5 the explosion and/or instantaneous discharge of the contents of the MAPP Gas cylinder in Mr.  
6 Shalaby's hands, when it occurred, and was aware at the time that her husband was sustaining  
7 severe and life threatening injuries.

8           56. Both Mr. Shalaby and Ms. Dunn-Ruiz suffered serious emotional distress as a  
9 result of experiencing and observing the April 21, 2006 incident, respectively, including severe  
10 mental suffering, grief, anguish, anxiety, depression, worry, shock, and in the case of Mr.  
11 Shalaby, Post Traumatic Stress Disorder.

12           57. The negligence of Defendants in designing, manufacturing, distributing,  
13 marketing and selling the defective torch and/or MAPP Gas cylinder was a substantial factor in  
14 causing Plaintiffs' serious emotional distress.  
15

16           Wherefore, Plaintiffs DEMAND A JURY TRIAL, and pray that a judgment be entered  
17 against Defendants, and each of them, as follows:  
18

19           1. For general damages, including but not limited to damages for emotional distress,  
20 pain and suffering, according to proof;

21           2. For special damages, including but not limited to out of pocket medical expenses  
22 and incidental expenses related to Mr. Shalaby's injuries, and lost income, according to proof;

23           3. For exemplary damages;

24           4. For prejudgment interest according to law;

25           5. For costs of suit incurred in this action; and  
26  
27  
28

1  
2           6.       For any other and further relief that the court deems just and proper.  
3

4       Dated: June 11, 2007

ALBORG, VEILUVA & EPSTEIN LLP

5                               /s/

6                               By: \_\_\_\_\_

MARK D. EPSTEIN

Attorneys for Plaintiffs  
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2 KELLER, PRICE & MOORHEAD  
3 229 Avenue I, Second Floor  
4 Redondo Beach, California 90277-5600  
5 Telephone: (310) 540-1332

6  
7  
8 Attorneys for Defendants, BERNZOMATIC, an Unincorporated Division  
9 of Irwin Industrial Tool Company and THE HOME DEPOT, INC.

10  
11 UNITED STATES DISTRICT COURT  
12  
13 NORTHERN DISTRICT OF CALIFORNIA

14 ANDREW SHALABY, an individual, ) CASE NO. C 06 7026 EDL  
15 and SONIA DUNN-RUIZ, an )  
16 individual, ) Magistrate Judge Elizabeth D.  
17 ) LaPorte  
18 Plaintiffs, )  
19 v. ) ANSWER TO FIRST AMENDED  
20 ) COMPLAINT BY BERNZOMATIC AND  
21 ) THE HOME DEPOT, INC.  
22 IRWIN INDUSTRIAL TOOL COMPANY )  
23 and THE HOME DEPOT, INC. and )  
24 DOES 2 through 100, inclusive, )  
25 Defendants. )  
26 \_\_\_\_\_ )

27  
28 COME NOW, Defendants, Bernzomatic, an Unincorporated Division  
29 of Irwin Industrial Tool Company, and The Home Depot, Inc., and  
30 answer the First Amended Complaint of Andrew Shalaby and Sonia  
31 Dunn-Ruiz on file herein by admitting, denying and alleging as  
32 follows:

33  
34 **JURISDICTION AND VENUE**

35 1. Answering paragraph 1, Defendants are without sufficient  
36 knowledge or information to form a belief as to the truth of the  
37 allegations contained in said paragraph, and on that basis, deny  
38 each and every allegation contained therein.

1           2. In response to paragraph 2, Defendants admit all  
2 allegations contained therein.

3           3. In response to paragraph 3, Defendants admit all  
4 allegations contained therein.

5           4. In response to paragraph 4, Defendants admit that  
6 Defendant The Home Depot, Inc. is, and at all times relevant was,  
7 a corporation organized and existing under the laws of the State  
8 of Delaware, with its principal place of business in Atlanta,  
9 Georgia. Defendants admit that The Home Depot, Inc., is a retail  
10 seller of hardware, appliances, building materials, gardening  
11 materials, and other home improvement supplies, and that it  
12 operates stores throughout the United States, including  
13 California, with stores in the cities of Emeryville (Alameda  
14 County) and El Cerrito (Contra Costa County), California.  
15 Defendants further admit that The Home Depot, Inc., sells, among  
16 other things Bernzomatic brand MAPP Gas torches. Home Depot  
17 U.S.A., Inc., is an indirect and principal operating subsidiary of  
18 Defendant The Home Depot, Inc. Defendants deny each and every  
19 remaining allegation of paragraph 4, except for those allegations  
20 which are expressly admitted above.

21           5. In response to paragraph 5, Defendants are without  
22 sufficient knowledge or information to form a belief as to the  
23 truth of the allegations contained in said paragraph, and on that  
24 basis, deny each and every allegations contained therein.

25           6. In response to paragraph 6, Defendants are without  
26 sufficient knowledge or information to form a belief as to the  
27 truth of the allegations contained in said paragraph, and on that  
28 basis, deny each and every allegations contained therein.



1       7. In response to paragraph 7, Defendants admit all  
2 allegations contained therein.

3       8. In response to paragraph 8, Defendants admit all  
4 allegations contained therein.

5  
6                                   **FACTUAL ALLEGATIONS**

7       9. In response to paragraph 9, Defendants admit the flame  
8 from a Bernzomatic MAPP Gas torch is intended to be used for  
9 soldering, welding, and other purposes that are described on the  
10 cylinder labels, on Bernzomatic internet website:  
11 <http://www.Bernzomatic.com> and in other product-related  
12 instructions and promotional materials. Defendants deny all  
13 remaining allegations of paragraph 9 on the basis that Defendants  
14 are without sufficient knowledge or information to form a belief  
15 as to the truth of the remaining allegations contained in said  
16 paragraph, and on that basis deny each and every remaining  
17 allegation contained therein.

18       10. In response to paragraph 10, Defendants admit all  
19 allegations contained therein.

20       11. In response to paragraph 11, Defendants are without  
21 sufficient knowledge or information to form a belief as to the  
22 truth of the allegations contained in said paragraph, and on that  
23 basis, deny each and every allegations contained therein.

24       12. In response to paragraph 12, Defendants are without  
25 sufficient knowledge or information to form a belief as to the  
26 truth of the allegations contained in said paragraph, and on that  
27 basis, deny each and every allegations contained therein.

28       13. In response to paragraph 13, Defendants are without

1 sufficient knowledge or information to form a belief as to the  
2 truth of the allegations contained in said paragraph, and on that  
3 basis, deny each and every allegations contained therein.

4 14. In response to paragraph 14, Defendants admit that MAPP  
5 Gas torch kits contained a written representation that, among  
6 other things, one of the intended and/or acceptable uses of the  
7 torches was for "lighting grills." Defendants deny each and every  
8 remaining allegation contained in paragraph 14, except for the  
9 allegation expressly admitted above.

10 15. In response to paragraph 15, Defendants admit that  
11 neither torches nor MAPP Gas cylinders sold by Defendants  
12 contained a warning against using their torches to ignite a wood  
13 campfire. Defendants deny each and every remaining allegation  
14 contained in paragraph 15, except for the allegation expressly  
15 admitted above.

16 16. In response to paragraph 16, Defendants deny each and  
17 every allegation contained therein.

18 17. In response to paragraph 17, Defendants deny each and  
19 every allegation contained therein.

20 18. In response to paragraph 18, Defendants are without  
21 sufficient knowledge or information to form a belief as to the  
22 truth of the allegation contained in said paragraph, and on that  
23 basis, deny each and every allegation contained therein.

24 19. In response to paragraph 19, Defendants admit all  
25 allegations contained therein.

26 20. In response to paragraph 20, Defendants admit that, on  
27 or about the evening of April 21, 2006, Mr. Shalaby was seriously  
28 injured. Defendants deny each and every remaining allegation

1 contained in paragraph 20, except for the allegation expressly  
2 admitted above.

3 21. In response to paragraph 21, Defendants are without  
4 sufficient knowledge or information to form a belief as to the  
5 truth of the allegations contained in said paragraph, and on that  
6 basis, deny each and every allegation contained therein.

7 22. In response to paragraph 22, Defendants are without  
8 sufficient knowledge or information to form a belief as to the  
9 truth of the allegations contained in said paragraph, and on that  
10 basis, deny each and every allegation contained therein.

11 23. In response to paragraph 23, Defendants are without  
12 sufficient knowledge or information to form a belief as to the  
13 truth of the allegations contained in said paragraph, and on that  
14 basis, deny each and every allegation contained therein.

15 24. In response to paragraph 24, Defendants are without  
16 sufficient knowledge or information to form a belief as to the  
17 truth of the allegations contained in said paragraph, and on that  
18 basis, deny each and every allegation contained therein.

19 25. In response to paragraph 25, Defendants are without  
20 sufficient knowledge or information to form a belief as to the  
21 truth of the allegations contained in said paragraph, and on that  
22 basis, deny each and every allegation contained therein.

23

24 **FIRST CAUSE OF ACTION - STRICT PRODUCTS LIABILITY**

25 **(By Mr. Shalaby Against Irwin Industrial Tools and Home Depot)**

26 26. Defendants incorporate by this reference the responses  
27 contained in paragraphs 1 through 25 above, as though fully set  
28 forth herein.

1       27. In response to paragraph 27, Defendants deny each and  
2 every allegation contained therein.

3       28. In response to paragraph 28, Defendants deny each and  
4 every allegation contained therein.

5       29. In response to paragraph 29, Defendants deny each and  
6 every allegation contained therein.

7       30. In response to paragraph 30, Defendants admit that  
8 Defendant, Irwin Industrial Tool Company designed, manufactured,  
9 distributed, and marketed MAPP Gas torches under the "Bernzomatic"  
10 brand name. Defendants admit that Irwin Industrial Tool Company  
11 distributed and marketed MAPP Gas cylinders under the  
12 "Bernzomatic" brand name. Defendants admit that The Home Depot,  
13 Inc., sold Bernzomatic brand MAPP Gas torches and cylinders.  
14 Defendants deny that the Bernzomatic brand torches and/or  
15 cylinders contained manufacturing and/or design defects when they  
16 left Defendants' possession. Defendants deny any other  
17 allegations which may be included or implied in paragraph 30  
18 except for those allegations expressly admitted above.

19       31. In response to paragraph 31, Defendants deny each of the  
20 allegations contained therein with the exception of the  
21 allegations of subparts a. through f., inclusive, which Defendants  
22 deny on the basis that Defendants are without sufficient knowledge  
23 or information to form a belief as to the truth of the allegations  
24 contained in said subparts.

25  
26       **SECOND CAUSE OF ACTION - STRICT LIABILITY FOR FAILURE TO WARN**

27       **(By Mr. Shalaby Against Irwin Industrial Tools and Home Depot)**

28       32. Defendants incorporate by this reference the responses

1 contained in paragraphs 1 through 31 above, as though fully set  
2 forth herein.

3 33. In response to paragraph 33, Defendants deny each and  
4 every allegation contained therein.

5 34. In response to paragraph 34, Defendants deny each and  
6 every allegation contained therein.

7 35. In response to paragraph 35, Defendants deny each and  
8 every allegation contained therein.

9 36. In response to paragraph 36, Defendants deny each and  
10 every allegation contained therein.

11 37. In response to paragraph 37, Defendants deny each and  
12 every allegation contained therein.

13

14

**THIRD CAUSE OF ACTION - NEGLIGENCE**

15

**(By Mr. Shalaby Against Irwin Industrial Tools)**

16

17

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38. Defendants incorporate by this reference the responses  
contained in paragraphs 1 through 37 above, as though fully set  
forth herein.

19

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39. In response to paragraph 39, Defendant admits that  
Bernzomatic is a division of Defendant, Irwin Industrial Tool  
Company, which designed, manufactured, distributed, marketed,  
and/or sold Bernzomatic brand torches, and distributed and  
marketed MAPP Gas cylinders. Defendants deny each and every  
remaining allegation contained in paragraph 39 except for the  
allegations expressly admitted above.

26

27

40. In response to paragraph 40, Defendant denies each and  
every allegation contained therein.

28

41. In response to paragraph 41, Defendant denies each and

1 every allegation contained therein.

2 42. In response to paragraph 42, Defendant denies each and  
3 every allegation contained therein.

4

5 **FOURTH CAUSE OF ACTION - NEGLIGENT FAILURE TO WARN**

6 **(By Mr. Shalaby Against Irwin Industrial Tools and Home Depot)**

7 43. Defendants incorporate by this reference the responses  
8 contained in paragraphs 1 through 42 above, as though fully set  
9 forth herein.

10 44. In response to paragraph 44, Defendants deny each and  
11 every allegation contained therein.

12 45. In response to paragraph 45, Defendants deny each and  
13 every allegation contained therein.

14 46. In response to paragraph 46, Defendants deny each and  
15 every allegation contained therein.

16 47. In response to paragraph 47, Defendants deny each and  
17 every allegation contained therein.

18

19 **FIFTH CAUSE OF ACTION - BREACH OF**

20 **IMPLIED WARRANTY OF MERCHANTABILITY**

21 **(By Mr. Shalaby Against Irwin Industrial Tools and Home Depot)**

22 48. Defendants incorporate by this reference the responses  
23 contained in paragraphs 1 through 47 above, as though fully set  
24 forth herein.

25 49. In response to paragraph 49, Defendants deny each and  
26 every allegation contained therein.

27 50. In response to paragraph 50, Defendants admit each and  
28 every allegation contained therein.

1        51. In response to paragraph 51, Defendants deny each and  
2 every allegation contained therein.

3        52. In response to paragraph 52, Defendants deny each and  
4 every allegation contained therein.

5                    **SIXTH CAUSE OF ACTION - NEGLIGENT INFLECTION**  
6                    **OF EMOTIONAL DISTRESS**

7                    **(By Plaintiffs Against All Defendants)**

8        53. Defendants incorporate by this reference the responses  
9 contained in paragraphs 1 through 52 above, as though fully set  
10 forth herein.

11        54. In response to paragraph 54, Defendants deny each and  
12 every allegation contained therein.

13        55. In response to paragraph 55, Defendants are without  
14 sufficient knowledge or information to form a belief as to the  
15 truth of the allegations contained in said paragraph, and on that  
16 basis, deny each and every allegation contained therein.

17        56. In response to paragraph 56, Defendants deny each and  
18 every allegation contained therein.

19        57. In response to paragraph 57, Defendants deny each and  
20 every allegation contained therein.

21  
22                    **FIRST AFFIRMATIVE DEFENSE**

23        58. Plaintiffs' First Amended Complaint herein, and each and  
24 every cause of action therein, fails to state facts sufficient to  
25 constitute a cause of action against these answering Defendants  
26 upon which relief can be predicated.

27                    **SECOND AFFIRMATIVE DEFENSE**

28        59. Plaintiffs' injuries and damages, if any, were caused in



1 whole or in part by their own lack of due care, and their recovery  
2 herein, if any, should be correspondingly barred or reduced.

3 **THIRD AFFIRMATIVE DEFENSE**

4 60. Plaintiffs' injuries and damages, if any, were caused in  
5 whole or in part by the acts and/or omissions of some third party  
6 or third parties over whom these answering Defendants had no  
7 control and for whose acts and/or omissions these answering  
8 Defendants are neither responsible nor liable.

9 **FOURTH AFFIRMATIVE DEFENSE**

10 61. These answering Defendants' liability, if any, for non-  
11 economic damages suffered by Plaintiffs shall be several only, and  
12 not joint, and Defendants shall only be liable, if at all, for the  
13 non-economic damages allocated to them in direct proportion to  
14 their percentage of fault, if any, as more fully defined in  
15 California Civil Code, Section 1431.2(a), et seq.

16 **FIFTH AFFIRMATIVE DEFENSE**

17 62. At all times relevant hereto, Plaintiffs failed and/or  
18 refused to properly mitigate their damages, and their recovery  
19 herein, if any, should be correspondingly barred or reduced.

20 **SIXTH AFFIRMATIVE DEFENSE**

21 63. At the time of the incident alleged in the First Amended  
22 Complaint on file herein, the product therein described was/had  
23 been altered, modified, and/or was in a condition different than  
24 that in which it had left the possession of these answering  
25 Defendants.

26 **SEVENTH AFFIRMATIVE DEFENSE**

27 64. At the time of the incident alleged in the First Amended  
28 Complaint on file herein, the product therein described was/had



1 been damaged, abused, unforeseeably misused, and/or was not  
2 properly maintained after it left the possession of these  
3 answering Defendants.

4 WHEREFORE, Defendants, Bernzomatic, an Unincorporated  
5 Division of Irwin Industrial Tool Company and The Home Depot,  
6 Inc., pray judgment on the First Amended Complaint of Andrew  
7 Shalaby and Sonia Dunn-Ruiz herein as follows:

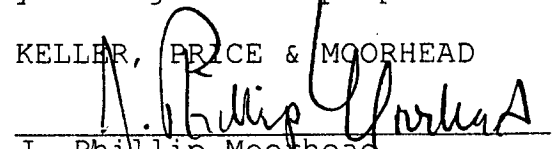
8 1. That Plaintiffs take nothing from these answering  
9 Defendants by way of their First Amended Complaint herein;

10 2. That these answering Defendants be awarded their costs of  
11 suit incurred herein;

12 3. That these answering Defendants be awarded such other and  
13 further relief as the Court may deem just and proper.

14 DATED: June 19, 2007

KELLER, PRICE & MOORHEAD

15   
16 J. Phillip Moorhead  
17 Attorneys for Defendants,  
18 BERNZOMATIC, an Unincorporated  
19 Division of Irwin Industrial Tool  
20 Company and THE HOME DEPOT, INC.  
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1 UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
2 Andrew Shalaby v. Bernzomatic/Home Depot, Inc.  
CASE NO. C 06 7026 CW

3  
4 **PROOF OF SERVICE**

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 229 Avenue "I", Second Floor, Redondo Beach, California 90277.

On June 19, 2007, I served the foregoing document described as **ANSWER TO FIRST AMENDED COMPLAINT** on all interested parties in this action as set forth below:

9  
10 Mark D. Epstein  
Alborg, Veiluva & Epstein LLP  
200 Pringle Avenue, Suite 410  
11 Walnut Creek, CA 94596  
(925) 939-9880 FAX (925) 939-9915  
12 (Attorneys for Plaintiffs, Andrew Shalaby and Sonia Dunn-Ruiz)

13  
14 FACSIMILE - by use of facsimile machine telephone number  
(310)540-8480, I served a copy of the within document, to the by  
15 facsimile numbers set forth above. The facsimile machine I used  
16 complied with California Rules of Court, Rule 2004, and no error  
17 was reported by the machine. Pursuant to California Rules of  
Court, Rule 2006(d), I caused the machine to print a transmission  
record of the transmission, a copy of which is attached to this  
Declaration.

18 MAIL - I caused such envelope with postage thereon fully  
19 prepaid to be placed in the United States mail at Redondo Beach,  
California. I am "readily familiar" with the firm's practice of  
20 collection and processing correspondence for mailing. Under that  
21 practice it would be deposited with the U.S. Postal Service that  
22 same day with postage thereon fully prepaid at Redondo Beach,  
California, in the ordinary course of business. I am aware that on  
23 motion of the party served, service is presumed invalid if postal  
cancellation date or postage meter date is more than one day after  
date of deposit for mailing in affidavit.

24 FEDERAL - I declare under penalty of perjury that the  
25 foregoing is true and correct, and that I am employed in the office  
of a member of the Bar of this Court at whose direction the service  
was made.

26 Executed on June 19, 2007, at Redondo Beach, California.

27 Deidre A. Picascia  
28 Deidre A. Picascia